

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>Case No. 4:21-cr-0009-GCH</b>
	)	
<b>v.</b>	)	
	)	
<b>ROBERT T. BROCKMAN,</b>	)	
	)	
<b>Defendant.</b>	)	
<hr/>	)	

**NON-PARTY STUART YUDOFSKY, M.D.'S MOTION FOR  
LEAVE FOR COUNSEL TO BE HEARD**

Non-Party Stuart Yudofsky, M.D. ("Dr. Yudofsky"), respectfully moves the Court for leave for his counsel to be heard during the Defendant's competency hearing set to begin on November 15, 2021. The Government has notified Dr. Yudofsky that it intends to call him as a witness during the third day (November 17) of the competency hearing. On the advice of counsel, Dr. Yudofsky will invoke his rights under the Fifth Amendment to the U.S. Constitution and decline to respond to all questions proffered by the Government other than those seeking basic identifying information. The Government has indicated its intent to urge the Court to compel Dr. Yudofsky to answer its questions, notwithstanding his valid assertion of his right to decline to respond in reliance on the Fifth Amendment. Should he be called as a witness, Dr. Yudofsky respectfully moves the Court to permit his counsel to interpose objections and argue the important constitutional issues

that will be present in the event the Government seeks to persuade the Court to compel Dr. Yudofsky to answer its questions despite his assertion of his constitutional right.

### **BACKGROUND**

On June 10, 2019, the Government served Dr. Yudofsky, through his counsel, with a subpoena to testify before the grand jury in San Francisco three days later (the “Grand Jury Subpoena,” Dkt. No. 108, Ex. 3). On June 11, 2019, the lawyer for the Government informed Dr. Yudofsky’s counsel that his grand jury attendance was excused.

On February 24, 2021<sup>1</sup>, four months after return of the indictment in this case, the Government served Dr. Yudofsky with a subpoena issued pursuant to Fed. R. Crim. P. 17(c), calling for the production of documents – including medical records – and for his appearance at a hearing that was then-scheduled for June 29, 2021, in the U.S. District Court for the Southern District of Texas.

In early June 2021, the Government contacted Dr. Yudofsky’s counsel to request an interview. In a series of telephone discussions and e-mail exchanges that took place on June 8 and June 15, 2021, the Government lawyers were informed that, on the advice of counsel, Dr. Yudofsky would decline to participate in the requested interview without a grant of use immunity consistent with 18 U.S.C. § 6002.

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<sup>1</sup> The subpoena was dated February 22, 2021.

On June 21, 2021<sup>2</sup>, the Government served a new Rule 17 subpoena (dated May 10, 2021) and informed Dr. Yudofsky's counsel that the competency hearing had been continued to September 13, 2021. On August 11, 2021, Dr. Yudofsky's counsel noted disagreement with the Government's posture with regard to the scope of the Rule 17 Subpoena and sent formal notice of Dr. Yudofsky's intent to assert his Fifth Amendment right, on advice of counsel, should he be called to testify. On September 20, 2021, the Government served Dr. Yudofsky with an updated subpoena reflecting the current competency hearing date of November 15, 2021.

On August 6, 2021, Dr. Yudofsky produced the Defendant's patient file, which consisted of 16 marked pages of handwritten physician's notes. The Government claimed that the production was incomplete, contending that the Rule 17 Subpoena called for "any and all emails between [Dr. Yudofsky] and Mr. Brockman...from January 2010 to present."<sup>3</sup> Since that date, Dr. Yudofsky has made three additional productions. The final production made on October 29, 2021, completed Dr. Yudofsky's production of all e-mails spanning the past 11 years between Dr. Yudofsky and Mr. Brockman.

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<sup>2</sup> The Government's Unopposed Motion for an Order Under Federal Rule of Criminal Procedure 17(c)(1), Dkt. No. 70, incorrectly stated that the Subpoena was served on May 10, 2021. Dr. Yudofsky was not served with the subpoena until June 21, 2021 – six weeks after the purported issuance date and five days after the Government filed its motion with the Court representing that Dr. Yudofsky had already been served weeks earlier. *See* E-mail from Evan Garrett, Special Agent, IRS-CI, to Mark MacDougall, Counsel for Dr. Yudofsky (June 21, 2021) (Dkt. No. 108, Ex. 2).

<sup>3</sup> E-mail from Corey Smith, Counsel for the Government, to Samantha Block, Counsel for Dr. Yudofsky (Aug. 10, 2021) (Dkt. No. 108, Ex. 5).

## **ARGUMENT**

The Supreme Court has repeatedly held that one of the [Fifth Amendment](#)’s “basic functions...is to protect *innocent* men...‘who otherwise might be ensnared by ambiguous circumstances.’” *Ohio v. Reiner*, 532 U.S. 17, 21 (2001); *Grunewald v. United States*, [353 U.S. 391](#), 421 (1957) (quoting *Slochower v. Board of Higher Ed. of New York City*, [350 U.S. 551](#), 557—558 (1956)) (emphasis in original). “[T]he power to compel testimony is not absolute,” and is subject to “the Fifth Amendment privilege against compulsory self-incrimination.” *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972).

“If the government feels that [Dr. Yudofsky’s] testimony is worth it, and lacks any interest in prosecuting [him], it can grant [him] immunity.” *In re Brogna*, 589 F.2d 24, 28 (1st Cir. 1978). Should the Government seek to persuade the Court to order Dr. Yudofsky to respond to its questions – over the assertion of his right to decline to answer under the Fifth Amendment – a critical constitutional right will be at risk and Dr. Yudofsky should have the benefit of the presence and advocacy of his counsel.

For the foregoing reasons, Dr. Yudofsky respectfully requests that the Court grant counsel for Dr. Yudofsky leave to be heard on his behalf during the competency hearing set to begin on November 15, 2021.

Dated: November 12, 2021

Respectfully submitted,

/s/ Draft

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*Counsel for non-party Stuart Yudofsky, M.D.*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served on all counsel of record via electronic filing in compliance with the Federal Rules of Civil Procedure on this 12th day of November 2021.

/s/ *Draft*

Nicholas E. Petree